

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVID ANTHONY CARDONA,  
Plaintiff,  
v.  
RICKETT,  
Defendant.

No. 2:23-cv-0766 AC P

ORDER

Plaintiff, a state prisoner proceeding pro se, seeks relief pursuant to 42 U.S.C. § 1983 and has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.

I. Application to Proceed In Forma Pauperis

Plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). ECF Nos. 2, 8. Accordingly, the request to proceed in forma pauperis will be granted.

Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28 U.S.C. §§ 1914(a), 1915(b)(1). By this order, plaintiff will be assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. § 1915(b)(1). By separate order, the court will direct the appropriate agency to collect the initial partial filing fee from plaintiff's trust account and forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated for monthly payments of twenty percent of the preceding month's income credited to plaintiff's prison trust account. These payments will be forwarded by the appropriate agency to the Clerk of the Court each time

1 the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C.  
2 § 1915(b)(2).

### 3 II. Statutory Screening of Prisoner Complaints

4 The court is required to screen complaints brought by prisoners seeking relief against "a  
5 governmental entity or officer or employee of a governmental entity." 28 U.S.C. § 1915A(a).  
6 The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are  
7 "frivolous, malicious, or fail[] to state a claim upon which relief may be granted," or that "seek[]  
8 monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b).

9 A claim "is [legally] frivolous where it lacks an arguable basis either in law or in fact."  
10 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th  
11 Cir. 1984). "[A] judge may dismiss . . . claims which are 'based on indisputably meritless legal  
12 theories' or whose 'factual contentions are clearly baseless.'" Jackson v. Arizona, 885 F.2d 639,  
13 640 (9th Cir. 1989) (quoting Neitzke, 490 U.S. at 327), superseded by statute on other grounds as  
14 stated in Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000). The critical inquiry is whether a  
15 constitutional claim, however inartfully pleaded, has an arguable legal and factual basis.  
16 Franklin, 745 F.2d at 1227-28 (citations omitted).

17 "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the  
18 claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of  
19 what the . . . claim is and the grounds upon which it rests.'" Bell Atl. Corp. v. Twombly, 550  
20 U.S. 544, 555 (2007) (alteration in original) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).  
21 "Failure to state a claim under § 1915A incorporates the familiar standard applied in the context  
22 of failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)." Wilhelm v. Rotman,  
23 680 F.3d 1113, 1121 (9th Cir. 2012) (citations omitted). In order to survive dismissal for failure  
24 to state a claim, a complaint must contain more than "a formulaic recitation of the elements of a  
25 cause of action;" it must contain factual allegations sufficient "to raise a right to relief above the  
26 speculative level." Twombly, 550 U.S. at 555 (citations omitted). "[T]he pleading must contain  
27 something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally  
28 cognizable right of action." Id. (alteration in original) (quoting 5 Charles Alan Wright & Arthur

1 R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004)).

2 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to  
3 relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting  
4 Twombly, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual  
5 content that allows the court to draw the reasonable inference that the defendant is liable for the  
6 misconduct alleged.” Id. (citing Twombly, 550 U.S. at 556). In reviewing a complaint under this  
7 standard, the court must accept as true the allegations of the complaint in question, Hosp. Bldg.  
8 Co. v. Trs. of the Rex Hosp., 425 U.S. 738, 740 (1976) (citation omitted), as well as construe the  
9 pleading in the light most favorable to the plaintiff and resolve all doubts in the plaintiff’s favor,  
10 Jenkins v. McKeithen, 395 U.S. 411, 421 (1969) (citations omitted).

### 11 III. Complaint

12 The complaint alleges that defendant Rickett<sup>1</sup> violated plaintiff’s Eighth Amendment  
13 rights. ECF No. 1. Specifically, plaintiff alleges that on July 27, 2022, Rickett approached  
14 plaintiff and began harassing him by asking who he was. Id. at 4. After plaintiff provided his  
15 name and told defendant that he was a member of the inmate advisory council and allowed to be  
16 on the yard, defendant told him he did not want plaintiff on the yard and began spitting sunflower  
17 seeds at him. Id. Defendant then told plaintiff that if he did not leave Rickett would not open the  
18 yard up for recreation, and that he would tell the other inmates that they did not get yard time  
19 because of plaintiff. Id. When plaintiff asked defendant to stop spitting at him, defendant told  
20 plaintiff that he would call the other officers onto the yard to strip plaintiff. Id. When two other  
21 officers arrived and confirmed that plaintiff was permitted to be on the yard because of his  
22 position on the council, Rickett stated that he did not care and did not want plaintiff on the yard  
23 for any reason. Id. at 5. The other officers asked plaintiff to come back in ten minutes and  
24 plaintiff complied with their request and went to the programs office to make a complaint about  
25 Rickett’s behavior. Id.

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27 <sup>1</sup> Defendant’s name was entered on the docket at “Pickett.” Plaintiff has requested that the  
28 docket be updated to correctly reflect that defendant’s name is “Rickett.” ECF No. 6. That  
request will be granted.

1 IV. Failure to State a Claim

2 “[A] prison official violates the Eighth Amendment only when two requirements are met.  
3 First, the deprivation alleged must be, objectively, sufficiently serious; a prison official’s act or  
4 omission must result in the denial of the minimal civilized measure of life’s necessities.” Farmer  
5 v. Brennan, 511 U.S. 825, 834 (1994) (internal quotation marks and citations omitted). Second,  
6 the prison official must subjectively have a sufficiently culpable state of mind, “one of deliberate  
7 indifference to inmate health or safety.” Id. (internal quotation marks and citations omitted).

8 Plaintiff’s allegations against Rickett are insufficient to state a claim for relief. Although  
9 Rickett’s harassment of plaintiff and threats were unprofessional and inappropriate, without more,  
10 they do not rise to the level of an Eighth Amendment violation. See Simmons v. Ryan, No. 18-  
11 cv-0131 PHX DJH (JFM), 2019 WL 11648559, \*8 (D. Ariz. Nov. 20, 2019) (spitting on prisoner  
12 is inappropriate but does not violate Eighth Amendment) (collecting cases); DeMallory v. Cullen,  
13 855 F.2d 422, 444 (7th Cir. 1988) (“a correctional officer spitting upon a prisoner does not rise to  
14 the level of a constitutional violation”); Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir.  
15 1987) (“[v]erbal harassment or abuse . . . is not sufficient to state a constitutional deprivation  
16 under 42 U.S.C. § 1983.” (alteration in original) (citation omitted)).

17 V. Leave to Amend

18 The complaint does not state any cognizable claims for relief and plaintiff will be given an  
19 opportunity to file an amended complaint. If plaintiff chooses to file an amended complaint, he  
20 must demonstrate how the conditions about which he complains resulted in a deprivation of his  
21 constitutional rights. Rizzo v. Goode, 423 U.S. 362, 370-71 (1976). The complaint must also  
22 allege in specific terms how each named defendant is involved. Arnold v. Int’l Bus. Machs.  
23 Corp., 637 F.2d 1350, 1355 (9th Cir. 1981). There can be no liability under 42 U.S.C. § 1983  
24 unless there is some affirmative link or connection between a defendant’s actions and the claimed  
25 deprivation. Id.; Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Furthermore, “[v]ague and  
26 conclusory allegations of official participation in civil rights violations are not sufficient.” Ivey v.  
27 Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982) (citations omitted).

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Plaintiff is also informed that the court cannot refer to a prior pleading in order to make his amended complaint complete. Local Rule 220 requires that an amended complaint be complete in itself without reference to any prior pleading. This is because, as a general rule, an amended complaint supersedes any prior complaints. Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967) (citations omitted), overruled in part by Lacey v. Maricopa County, 693 F.3d 896, 928 (9th Cir. 2012) (claims dismissed with prejudice and without leave to amend do not have to be re-pled in subsequent amended complaint to preserve appeal). Once plaintiff files an amended complaint, any previous complaints no longer serve any function in the case. Therefore, in an amended complaint, as in an original complaint, each claim and the involvement of each defendant must be sufficiently alleged.

#### VI. Plain Language Summary of this Order for a Pro Se Litigant

Your request to proceed in forma pauperis is granted. That means you do not have to pay the entire filing fee now. You will pay it over time, out of your trust account.

Your complaint will not be served because the facts you alleged are not enough to state a claim. Even though defendant spitting at you and threatening you was unprofessional and inappropriate, without more, it does not violate the Eighth Amendment.

You may amend your complaint to try to fix these problems. Be sure to provide facts that show exactly what each defendant did to violate your rights or to cause a violation of your rights.

If you choose to file an amended complaint, it must include all claims you want to bring. Once an amended complaint is filed, the court will not look at any information in the original complaint. **Any claims and information not in the amended complaint will not be considered.**

In accordance with the above, IT IS HEREBY ORDERED that:

1. Plaintiff's request for leave to proceed in forma pauperis (ECF No. 2) is GRANTED.
2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. § 1915(b)(1). All fees shall be collected and paid in accordance with this court's order to the appropriate agency filed concurrently herewith.

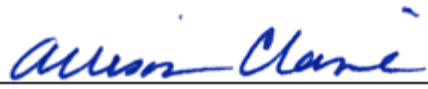
1           3. Plaintiff's request to correct defendant's name (ECF No. 6) is GRANTED and the  
2 Clerk of the Court is directed to update the docket to reflect that defendant's name is Rickett.

3           4. Plaintiff's complaint fails to state a claim upon which relief may be granted, see 28  
4 U.S.C. § 1915A, and will not be served.

5           5. Within thirty days from the date of service of this order, plaintiff may file an amended  
6 complaint that complies with the requirements of the Civil Rights Act, the Federal Rules of Civil  
7 Procedure, and the Local Rules of Practice. The amended complaint must bear the docket  
8 number assigned this case and must be labeled "First Amended Complaint." Failure to file an  
9 amended complaint in accordance with this order will result in a recommendation that this action  
10 be dismissed.

11           6. The Clerk of the Court is directed to send plaintiff a copy of the prisoner complaint  
12 form used in this district.

13 DATED: October 24, 2023

14   
15 ALLISON CLAIRE  
16 UNITED STATES MAGISTRATE JUDGE  
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